83-962

No._____

Office-Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1983

IN RE BEEF INDUSTRY ANTITRUST LITIGATON
M.D.L. Docket No. 248

MEAT PRICE INVESTIGATORS ASSOCIATION, et al.,

Petitioners,

v.

SAFEWAY STORES, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LEX HAWKINS
GLENN L. NORRIS
GEORGE F. DAVISON, JR.
HAWKINS & NORRIS
2801 Fleur Drive
Des Moines, Iowa 50309
Telephone: 515/288-6532

December 10, 1983

[List of attorneys continued on the signature page]

224-7631 — Review Publishing Co., 287 E. 6th St., St. Paul, Minn. 55101 — 224-7631

QUESTIONS PRESENTED

1. Whether cattle sellers who sell live cattle to packers, who in turn sell the beef therefrom to retail chain stores are prohibited from maintaining price-fixing actions against the retail chain stores by *Illinois Brick Co. v. Illinois*, where the price received by the cattlemen for the live cattle is the same price paid the packers by the retailers for the beef.

2. Whether each sales transaction must be analyzed to determine whether a perfect price pass-on is achieved, as opposed to analyzing the habit of the packing industry and the results actually received, over time.

3. Whether the cattlemen plaintiffs' summary judgment evidence raised material questions of fact regarding whether or not the packing industry's purchasing practices resulted in the functional equivalent of the cost-plus contract exception of *Illinois Brick Co. v. Illinois*.

4. Should the exception to the *Illinois Brick-Hanover Shoe* rule be expanded or altered to fit sellers selling into a rigged market under the circumstances of this case?

PARTIES TO THESE PROCEEDINGS

The consolidated cases herein involve several thousand named plaintiffs and a potential class of more than 60,000 plaintiffs and 24 named defendants.[1]

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[1] NO. 82-1433:

Meat Price Investigators Association, et al. v. Safeway Stores, Inc., et al.

Meat Price Investigators Association, et al. v. Safeway Stores, Inc., et al. (District of Columbia)

Ronald Becker, et al. v. Safeway Stores, Incorporated, et al.

Ronald Becker, et al. v. Safeway Stores, Incorporated, et al. (District of Columbia)

Plaintiffs:

A class consisting of all persons who are engaged in the business of raising what is commonly known in the cattle business as fat cattle, and each person who has in the period in question sold more than 100 head of fat cattle per annum.

Ronald Becker

Eugene Vander Hamm

Francis Stecker

Dean Stecker

James R. Glenn

Meat Price Investigators Association:

Rick Lundt, Arthur H. Van Wyk, Shelby Back, Finley Back, Leonard Tarpenning, Elton Tarter, James Baker, Robert L. Brown, Helen A. Behrends, Eugene Behrends, Dwayne Blank, Larry R. Bush, Sidney C. Cole, Maurice DeSutter, Jr., Duane Dilenbeck, Duane Dilenbeck for Horace C. Dilenbeck, Arthur D. Dykema, Edward H. Dykema, Dwight A. Wilson, Elizabeth Dykema, William M. Green, Virgil Handel, Richard A. Janssen, Dwight D. Johnson, Robert E. Lyons, Edwin G. Merema, Robert Merema, Duane Morgan, Bill J. Mosher and Mosher Brothers, Raynor Mosher, L. E. Reschke and Reschke Brothers, Archie Samuelson, Dale Sieben, Francis Smith, Hubert Swanson, Gale Toppert, Curtis H. Walsten, Russell Ward, Dave P. Weber, and Weber Beef, Inc., Samuel Blinn, George Tischhauser, Floyd Edgington, Jr., and Edna Feed Lot, Mike Schicke, Don N. Young, Les Cooper, David Wiebke, John

Morken, John O. Hedquist and Lazy H Ranch, Inc., Stanley R. Pankratz and Oakridge Farms, Inc., Henry Vonk, J. P. Hampton, Byron C. Hayes and Hayes Cattle Company, Inc., Ralph E. Henke, Robert Kessler and Kessler & Greeley, Earl W. Louden, Marion H. Mahnken and Mahnken Cattle Co., Omar W. Mahnken, Alfred Neuberger, Victor Ousley, Alvin Siteman, Boyd Simons and Triple T Cattle Corp. So., Arvin Aageson & Aageson Grain & Livestock, Franklin E. Barber and Peoples Creek Cattle Co., Jack Dahlin and Bar-Triangle J Ranch, Leonard Faber, Giles W. Gregoire, Arnold Hokanson, Pavlovick Brothers, Ambrose Phalen, Robert Sivertsen, Martin P. Toth, William W. Young and Sons, Wallace Warburton, Lyle Anderson and Anderson Bros., Charles Clark, Peter A. Duffy, Eldon Fetzer, Joseph Rand Foster, Lloyd Fox, Gay Hatle, Merrill Hinckley, Ava M. Hoff, Roy T. Hulm, Gary Lensegrav, Olav Lensegrav, Jay Lundt, William T. Malloy, James E. McKenna, Dell Oliver, Berwyn Svoboda, Dorothea Green, Edgar J. Boner, Willard V. Wilson, Beverly Green, James E. Allen, Vincent Amgerer, Arnold Andersen, James R. Arens, Emmet Ascherl and Ascherl Circle Steel, Inc., Donald Balvanz and Sons, Millard J. Barz, Howard J. Beatty, Arthur W. Benning, Robert J. Benz, LaVerne L. Berner, Eugene Bertelsen, Allan Bertram, Paul F. Bettin, Robert Billerbeck, Ralph Blackford, Harold Blome, Richard Bockwoldt, E. John Boehlje, Walter Boehlje, Eugene Bogenrief, Ronald Bohnsack, Clarence N. Bomgaars, Ivan C. Borcherding, Robert Borcherding, L. G. Borchers, Myron Borchers, Edward Bossard, Emil H. Bredekamp, David L. Brennecke, Ronald Brick, Paul R. Brinkmeyer, Alvin H. Broders, Lowell Broer, Terril Brophy and Brophy Land & Cattle Company, James Byrnes and Byrnes Bros., David Burt, Jerome F. Burken, Arthur J. Burkley, Loran N. Burken, Eugene A. Buechler, Dean R. Bruns, Mercer Bruggeman, Stephen P. Cain, Frank L. Campbell, Wayne Carter, George A. Chamberlain, Sr., D. Dean Clampitt, Leslie Clampitt, Glenn F. Clark, Marvin Collison & Collison Brothers, Frank L. Cook, Dan Coulter, Howard Crabb, William T. Carroll, Maurice Crawford, Peter Daale & Sons, Ronald Daale, Wilbur K. Daale, Davis Livestock Co., Hayden Davis, Dick DeHaai and DeHaai Farms, Inc., David Dewell, Harold Dewell, Larry Dewell, Lester Diercks, Robert Diercks, J. Paul Diercks, Jack M. Elliott and Dixon-Elliott, Inc., Harold Dubberke, Laurence J. Dvorsky & Son, Elmer A. Dykstra, Vernon B. Dykstra, Ray Christensen and Eddy Christensen, Floyd

Edgington, Jr., Arno Edler, Darrell Egli, Rudy Ehm and Ehm Feedlots, Inc., William J. Eljah, Craig D. Elliott and J. & C. Elliott Farm, Rex Engebretson, William P. Eno and Eno Farms, Inc., Richard Ermer, Jack Estle, Fred Faber, Tom Faber, Pat Farrell, Dale Fischer, David Fox, Glenn Freie, Kenneth Frey, William Lilienthal, Otto Frey, Curtis C. Frick and Frick & Frick, Peter J. Fromm, Jr., Roger Galles, Roy W. Gaunt, Robert L. Glaser, Gordon W. Goettsch, Sr., Ronald J. Good, Lloyd Goode, Vernon Goos, Lowell E. Gose and Gose Farms, Inc., Norman Graham, David L. Granzow, Melvin T. Gray, Jay Griggs, Joseph L. Griswold, Eugene Guth, Everett Guth, Dale C. Hackbarth, Elvern Hake, Gayland Hamann, Melvin L. Hamilton, Fred L. Hammans, Earle Hanselman, Robert N. Hanson, Thomas A. Hardersen, Lloyd L. Harmsen, Mrs. Inez B. Hass, David W. Hawkins, Harlan L. Hayes, Merlyn Hagland, Lin C. Heiller, Darel D. Hein, Clarence A. Heuberger, Craig D. Hill, Delmar Hill, James D. Hill, Arden Hinners, Donald Hinners, Mrs. Mary Lou Hinrichsen, William L. Hiscocks and Hiscocks & Rygh, Bruce Hjelm, Maurice Hjelm, Thomas F. Hoelscher, Gener Hoffman, Gary G. Holst, Cyrel Holthaus & Sons, Robert C. Holz, Royal Holz and Holz Brothers, Inc., Roger F. Honold, Alvin J. Howe, John Howe, Merlin Hoyer, Thomas J. Hughes, Tony Hulstein, Thomas Huston, Dean M. Jackson and Jackson Farms, Brad Jackson, Herbert R. Jackson, William P. Welsch, Wayne D. Jackson, Hartford Jackson, Lincoln Jackson, William Jass and Jass Brothers, Lester E. Joens, Wendell D. Johansen, Gerald Johnson, Fred C. Kahl, Philip Kaiser, Donald L. Kane, Harold Karrer, Larry Kay, Robert L. Kellog, Harold H. Kerndt, Raymond Kilburg, Carl J. King, John Kitzman, Frederick W. Kix, Delmar L. Klahn, Herman R. Klein & Sons, Alvin Klemme, Raymond Klemme, Darrel H. Kleppe, Robert Koester, Ralph L. Kooiker, John Krause, Leonard A. Kroll, Allen Kuehl, Dean Kumrow, Gerald W. Lawton and Associated Lawton Farm, Philip S. Lehman, L. F. Lehmeier, Harold L. Lewis, Donald D. Liska, H. S. Lovett, Jack Lovett, Wayne Lowe, Don Ludvigson, Howard Markwardt, Dean Markwardt, Arthur C. Marx, Elvyn Mateer, Cletus J. Mathis, Jack May, Wayne C. Meier, Robert S. Mendenhall & Sexton Farms, Hope B. Mendenhall, Joe Mente, Kenneth D. Meyer, Marvin Meyer & Son, Benne C. Miller, Charles W. Moffit, Merrill Mannetter, Ray Morlan, Robert Morris, Gary Mount, Marvin Musing, Greg L. Mulholland, Milton L. Mulholland, Charles Schneck-

loth and McClinmon & Schneckloth, Jason McCoskey, Glenn E. McCulloh, Bruce McLaughlin, Raynard McNaughton, Richard D. McNickle, Larry R. Neuhring, Dennis Patterson, Art Paulsen, Ralph Paulsen, Darwin Paulsen, Merlin Paulson, Carl Pennings, Ronald W. Petersen, Terry Petersen, Donald E. Peterson, Brad Peterson, Charles R. Peterson, John A. Peterson, Wendell Peterson, James A. Picht and Picht Farms, Inc., Carl Ploen, Clark Ploen, Duane O. Poor, Cecil W. Pottebaum, Leon R. Pralle, John Pretz, Leo Rathjen, Donald J. Reilly, Walter H. Reinholdt, Robert Reinke, Atlee Reisetter, Glenn Reisetter, Greg Reisinger, Roger Remmers, Tom Renner, William S. Renner, Melvin Renze, Dale Riediger, Ronald Riediger and D & R Farm Co., Rudolf Riessen and Riessen & Riessen, Ross C. River and River Family Farms, Inc., G. E. Roberts, Doyle Robinson, Arnold Rochau, Lorain Rock, Harley Rockow, John Rother, Walter Rother, William A. Rowson, Wilbur Rust, Keith Schlapkohl and Mud Creek Farms, Vernon Schlapkohl, Klaus P. Schnack, Jim Schneckloth, Hugo Schneckloth and Sunny View Farms, James C. Schmidt, LaVerne C. Schmidt, John A. Schneckloth and Sunny View Farms, C. Schneckloth and McClimon & Schneckloth, Alvy Schoenherr, Clem Schroeder, Vern Schroeder, David A. Schuett, Walter B. Schuver, Richard E. Schwartz, Glen Seberg, Roland Sharp, Rex Shaha, Kyle Shaha, William Sheriff, Jr. and Sheriff Farms, Inc., L. L. Sheriff, Norma Sheriff, Robert A. Schroder, Bruce Sienknect, Douglas Sienknect, Donald L. Smith, Irvin B. Straiert, Dean M. Stall, Laurin Stanek, Richard L. Stephens, Lee Stoll, Roy Stoll, John Streit, Leo J. Streit, Louis E. Sullivan, Francis Svuba and Svuba Farms, Inc., Glen L. Swanson, Maurice K. Swanton, Wayne C. Tank, Bob Ahrenstorff and Terrafact, Inc., Marvin R. Teske and Teske Bros., Alfred Te Slaa, E. Elmer Thomas, Robert H. Timmons, Victor C. Tomka, John Toomsen, Raynold Topp and Topp Brothers, David Topp, Donald J. Treinen, Griffeth Troester, Dale C. Upmeyer, William R. Utesch and Triple U Ranch, Severt Van Berkle, Kenneth Van Duzer, Wayne Van Duzer, Eugene Van Roikel, Dale Van Wyk and Sons, Paul Van Wyk, Wayne Van Wyk, Jerry Vlotho, Marvin Volkert & Volkert Farms, Inc., LeRoy Vos, Clarence Vos, Richard Walter, Clyde Walton, Merlin R. Watsabaugh, Byron K. Wegner, Dean H. Weih, Francis J. Weiland, Leonard Weiland, Daniel Welsh, Claire J. Welte, John H. Wenzel, Allan J. Werthmann, Gene Wetterling, A. B. White, R. M. Whitham,

Lloyd A. Whiton and Whiton Brothers, Charles R. Whitt, Dallas Williams, C. Wayne Wilson, Leland J. Wilson, Steve L. Wilson, Dean D. Wing, Henry Winter & Son, Martin Winter, Robert R. Wisor, Vernold Woebbeking, Kenneth D. Wright, Dennis Wulf, Alva Yoder, W. J. Zenishek, J. W. Zickefoose and E-Z Farms, Inc., Karl Zimmerman, Tom Hall, Larry Borchering, Ralpheal Knobbe, Larry D. Behrens, Robert W. Eason, Curtis Franzeen and Franzeen Farms, Edward P. Tomka, Mrs. Albert Hannasch, Donald E. Schechinger, Roger Bomgaars, Donald Sparks, Boyd Kimberley, Harry Kimberley, Leo J. Ullrich, Raymond P. Ullrich, Lee J. Vonnahme, Leo Danner, Peter Danner, Gerald F. Schreck, Ronald P. Seuntjens, Gerald G. Hall, Staiert Farm Partnership, Victor Wendl, Harold E. Reiman, Helen L. Conn and Conn Land & Cattle Co., Inc., Loras J. Stork, Donald J. Danner, Elmer D. Wiederin and Brincks and Wiederin Farms, Donald Badding, Curtis Freie, Victor Tomka and APT, Marvin H. Mohr, Victor J. Tomka, Jr., Vernal Onken, Waynes J. Reisberg, Billy Wanninger, James G. Tomka

Bob Severtson

Idlewild Farms, an Iowa partnership

Edna Feedlot, a Kansas Corporation.

NO. 82-1434:

Pony Creek Cattle Company, Inc. et al. v. The Great Atlantic & Pacific Tea Co., et al.

Plaintiffs:

Pony Creek Cattle Company, Inc., Lazy 8 Cattle Company, Coldwater Cattle Company, Hitch and Cantrell, Hitch-Atkinson Cattle Co., Inc., H. C. Hitch, Jr., Henry C. Hitch Ranch, Inc., Hitch Custom Cattle Feeding Corporation, Paul H. Hitch, Clark S. Willingham, Willingham and Hitch, Kearny County Cattle Company, Joe McGrew, Panhandle Cattle Feeders, Inc., Ralph Grounds, R. G. Grounds, Grounds-Sarchet, Grounds-Feil, Leo Winters d/b/a S & S Cattle Company, Leo Winters d/b/a WW Livestock Company, Glen Cantrell, Elmer Graham, Gene Stipe, C. O. Sage, Ravco Cattle Company, Vose & Son, Redd Feeding Company, Redd Feeding Corporation, Western Trio Cattle Fund No. 1, Western Trio Cattle Fund No. 2, Western Trio Cattle Fund No. 3, Western Trio Cattle Fund No. 4, Western Trio Cattle Fund No. 5, Western Trio Cattle Fund No. 6, Western Trio Cattle Fund No. 7, Western Trio Cattle Fund No. 8, Western Trio Cattle Fund No. 9, Western Trio Cattle Fund No. 10, Western Trio Cattle Fund No. 11, Western Trio Cattle

Fund No. 14, Western Trio Cattle Fund No. 15, Western Trio Cattle Fund No. 16, Western Trio Cattle Fund No. 17, Western Trio Cattle Fund No. 18, Western Trio Cattle Fund No. 19, Western Trio Cattle Fund No. 21, Western Trio Cattle Fund No. 22, Western Trio Special Option Fund A, Western Trio-B, Western Trio Special Option Fund BN, Western Trio Special Option Fund C, Western Trio Special Option Fund D, Western Trio Special Option Fund F, Western Trio Special Option Fund H, Western Trio Special Option Fund K, Western Trio Special Option Fund M, Western Trio Special Option Fund N, Western Trio Special Option Fund O, Western Trio Special Option Fund P, Western Trio Special Option Fund PC, Western Trio Special Option Fund PC-2, Western Trio Special Option Fund V, Western Trio Special Option Fund VR, Western Trio Special Option Fund W, Western Trio Special Option Fund X, Western Trio Special Option Fund Y and Western Trio Special Option Fund Z.

NO. 82-1435:

Richard S. Lowe, et al. v. Safeway Stores, Inc., et al.

Plaintiffs:

Richard S. Lowe, David Lorch, Percy Zylstra, Robert P. Knips, Clarence Kremer, Otto Lorch, Elmer Peters, Harlan D. Peterson, Walter Ranschau, Anthony Strouth, John Strouth and William Strouth, a partnership trading as Strouth Brothers, Bernard Thier, Richard Thier, Carl Winterboer, Charley Zylstra and Robert C. Zylstra, a partnership, and Charley Zylstra & Sons, Inc., an Iowa corporation.

NO. 82-1436:

Wagon Rod Ranch, et al. v. Safeway Stores, Inc. et al.
Trigg Cattle Company, Inc., et al. v. Safeway Stores, Inc., et al.
Seven Rivers Cattle Co., et al. v. Safeway Stores, Inc., et al.
Sagebrush Cattle Feeders, Inc., et al. v. Safeway Stores, Inc., et al.
Mrs. J. V. McAdoo, et al. v. Safeway Stores, Inc., et al.
A. D. Lee, et al. v. Safeway Stores, Inc., et al.
John T. Bean, et al. v. Safeway Stores, Inc., et al.
R. Dirk Agee, et al. v. Safeway Stores, Inc., et al.
Chaparral Cattle Corp., et al. v. Safeway Stores, Inc., et al.
Burke Petersen, et al. v. Safeway Stores, Inc., et al.
John O. Varian, et al. v. Safeway Stores, Inc., et al.
D. W. Lewter, et al. v. Great Atlantic & Pacific Tea Co., et al.

Plaintiffs:

Pecos Valley Feeders No. 1, Pecos Valley Feeders No. 2, Pecos Valley, Inc., Pecos Valley Management, Red River Properties,

Inc., S & L Land and Cattle Co., John A. Scarborough, Service Grain Co., Inc., Seven Rivers Cattle, Edward I. Smith, R. B. Stanton, Sudan Livestock & Feeding Co., Jim Turnbough, M. D. Weber, David White, David White and George Moreland, Bill Winchell a/k/a WIN Cattle Co., J. Troy Woodward, Irving de Cordova, Allen and Welch Adams, Adams Ranch, Allen Children Partnership, Robert N. Allen, Big 7 Cattlefeeders, Inc., Sarah Shepard Bobo, Fred Boston, Henry Boston, T. Coe Branch, Don Burson, Cagle & Love, James V. Campbell, L. B. Campbell, C. E. Carter & Sons, Carter Cattle Feeders, Carter-Kirchoff Feed Yards, Inc., Center Cattle Feeders, Cerrie Cattle Co., C. E. Christian, H. T. Copeland, Cowboy Cattle Co., James G. Cruce, Mark Curry Cattle Co., Dare Lock d/b/a Dare Lock Cattle Co., Gerald Darroh, F. S. Cattle Co., F & S Cattle Co., Don Ferrel, Gary Fletcher, Flying Cattle Feeders, Garrison Cattle, Inc., Given Bros., H. E. Graham, Eva Graham, Hamlett-Carter, Inc., Hammer-Carter, Inc., Otis Harmon, HCK Cattle Co., Inc., J. E. Helm, Reo Hinton, Hughes-Carter, Inc., D. D. & G. Jordan, E. M. Kee, Jr., Kelton-Carter, Inc., King-Carter, Inc., Kiowa Cattle Co., L & L Farms, Lee-Carter, Inc., Jack R. Love, M & M Cattle, MacKenzie Cattle Co., Martin Cattle Co., Inc., Charles B. Martin, Jr., Max Marble, T. C. Meinecke, Moreland-Carter, Inc., Morris-Carter, Inc., Richard Nall, O.K. Cattle Co., Howard Paine, Phillip D. Pinnell, Plainview Cattle Feeders, Plateau Cattle Co., Jana Posey, Jim Posey, James A. Potts, John Rogers, S & S Cattle Co., S.T.S.P.M. & F., Sage-brush Cattlefeeders, Inc., Shepard Cattle Co., Grady Shepard, Pat Shepard, Smith-Carter, Inc., Gerald & Dale Smith, John V. St. Evens, Larry Strugess, Roy Stockett, Victor Stout, Morgan Sturgess, T.L.&H Cattle Co., Tadlock Land & Cattle Co., Inc., Tee Pee Cattle Co., Texico Cattle Co., Inc., Texico Feedlots, Inc., Noah Tipton, Tobert Tipton, Paul Toliver, Triangle J. Cattle Co., Trinchera Cattle Co., Inc., Triple M Cattle Co., Inc., Triple "S" Cattle Co., Tularosa Cattle Co., Tulia Feedlot, Inc., Val Verde and C.E.C., Merlin Weber, Merlin Weber & M.D., Carroll Wiech, Weldon Young, K & C Cattle, B. R. Evans, J. B. Bean, Bills & Ellis Feedlot, Inc., J. P. Bramblett, G. R. Bryan, Charles Cunningham, Jewel Lutich, Louis Lutich, J. V. McAdoo, Jim McNeil, L. D. McNeil, d/b/a J & L Cattle Co., Ernesto Valenzuela, d/b/a Chihiahua Cattle Co., Thomas Waddell, Don Weinacht, Russell Wilbanks, Louis Alaia, Seymour K. Alban, Alp Company, Inc., Jewell Avent, d/b/a Avent Cattle Co., Avent & Avent, Avent & Farris, Avent and Hrbacek, Avent

& Lodin, Avent & Redd, Avent & Tipton, Avent & Tye, B. J. Cattle Co., Valdy Investment Co., V. R. Barnett, B. M. Bevis, Big Dipper Investment Co., Big Ten Investment Co., Bogle Farms, Inc., Margie Boles, Bert Buchanan, Jack Builtup, Johnnie Burson, C & C Cattle Co., Carne Rojo, Inc., Carol Investment Co., Cooperman Cattle Co., Fred B. Corn & Sons, Inc., Gayle Cotten, Cow Lick Cattle Inc., D & P Cattle Co., Dawn Cattle Corp., Carl Day, Jack Deason, Doc Cattle Feeders, Easter Cattle, H. W. "Bud" Eppers, Excalibur Cattle Co., Inc., Farmers Cattle Co., Feco Cattle Co., Feedum, Ltd., Five Star Cattle Co., Fleethaven Investment Co., Four E Cattle Co., Four I Cattle Co., 4-J Cattle Co., Four Star Cattle Co., Ganado Feeders, Mary Lou Glass, Sid Goodloe, Grofat, Ltd., Hall Cattle Co., Inc., Hall Four, Harshey Feed Lot, Inc., Kalman Heider, Charles Hoover, James T. Hull, A. D. Jones Estate Corp., Just Waiting Cattle Co., Kadee Cattle Co., Ketchum Ltd., Beaver & Baker Kerr, Carl Kleuskens, James E. Lankford, Lazy U Cattle Co., Losal, Ltd., M. D. Cattle Co., Markely-Barton-Hill, Matador Cattle Co., David McGee, the Estate of H. H. McGee, Phillip S. McKee, Melrose Cattle Co., Florene Menefee, L. D. Neumayer d/b/a Neumayer Ranch, Noland & Lawrence, J. B. Noland d/b/a Noland Cattle Co., Old Mill Investment Co., Warren Owen, Owens Electric Cattle Co., Peters Cattle Co., Frank Peters, Pruitt & Burney, Pruitt, Burney and Burney, R.W.&W., Ralph Rainwater, Ribeye Investment Co., Runningbrook Cattle, Inc., Sagebrush Cattle Feeders, Sanchez & Avent, Sawtooth Investment Co., Schrimsher Brothers, Inc., Silver Cattle Co., Simpson Brothers, Six-Way Cattle Co., Smith & Avent, Arnold Smith, Star Cattle Co., Sun Valley Cattle Co., T-Bone Feeders, Inc., Tex-Cal Feeders, Inc., Three E Cattle Co., Trojan Cattle Co., Tule Creek Cattle Co., 2 Way Cattle Co., WAF Investment Co., Stephen Warminski, Warren-Alban Cattle Co., Albert Watson, Albert Watson & CE & W, Watson & Eiffert, Watson & Horney, Watson & Wiggins, Watson Feed Yards, Inc., Watson Feed Yards & A & A, Watson Feed Yards, Inc. & C. M. Eiffert, Watson Feed Yards, Inc. & Arch Wilson, III, Lynn Welch, Benny Wilde Children, L. B. Worthan, Zavtig Investment Co., Jim Bean, John T. Bean, Lettunich Farms, Paul Lettunich, Harry O. Watkins, Avenales Cattle Co., Circle Bar Ranches, Diamond Cattle Co., Diamond Land & Cattle, Charles B. Evans, Jr., Peggy D. Evans, Liberty Livestock, McCormick Brothers, James B. Sinton, Norma M. Sinton, U X Livestock Co., William B. Wright, Jr., Linda S. Wright, John P. Wright,

d/b/a Mary's River Ranch, Elias Goicoechea, d/b/a Holland Ranch, Dean Rhoads, Walter Gardner, d/b/a W & C Cattle Co., Hillary Barnes, d/b/a Barnes Ranches, Inc., Bertrand Paris & Sons, S & R Cattle Co., Don and Martha Sims, Leslie Stewart, Chaparral Cattle Corp., Chaparral Cattle Corp., et al., d/b/a NB Cattle Co., Noonan Assoc., Thomas C. Noonan, Jr., Burke Petersen, Yvonne Peterson, d/b/a Eureka Ranch Co., Petersen Cattle Co., John O. Varian and Zera L. Varian, Durward W. Lewter, Melvin K. Dalton, Vonnie Dalton, Val Dalton, Aleta Dalton, Lynn Patterson, Linda Patterson, d/b/a Bar M. K. Ranches, Alma J. Redd, Robert Redd, Lynda Redd, d/b/a the Indian Creek Cattle Co.

NO. 82-1437:

A. L. Black, et al. v. Albertson's, Inc., et al.

Plaintiffs:

A. L. Black

Estate of G. B. "Pete" Buske:

Loy Deanne Styles; Lila Gay Vars; Phila May Weatherly; B. K. Buske; Lila M. Buske, Independent Executrix

Pioneer Cattle Order Buyers, Inc.:

Board of Directors: Don Foster; A. L. Black; Mary Bingham; Redge Priest; Doug Stephenson; Tom B. Simmons, Jr., trustee; Estate of John G. Carrothers

Officers: Don Foster; A. L. Black; Murry Bingham; Redge Priest; Doug Stephenson; Larry Knowles

Hereford Feedyards, Inc.:

Texas Beef Feedyards, Inc., doing business as Hereford Feedyards, Inc.

Texas Beef Feedyards, Inc., a wholly owned subsidiary of AZL Resources, Inc.:

Directors: Maurice F. Strong; Richard G. Brierley; Leonard Hentsch; William L. Holt; Michel LeGoc; Tom F. Marsh; James G. Niven; John M. O'Mara; Donald W. Solmonson; Scott M. Spangler; James W. Witherspoon

Officers: Maurice Strong; Scott M. Spangler; Mel P. Melsheimer; Donald W. Solmonson; Robert D. Josserand; Kenneth M. Gould; Joseph J. Lund; Franklin D. Dodge; Thomas M. Foster; Walter P. Pruitt; H. W. Van Loo

Solano Corporation:

Scott M. Spangler

Prochemco Cattle Company, Inc.:

Prochemco Cattle Company is a wholly-owned subsidiary of AZL Resources, Inc. (whose directors and officers are named

above under Hereford Feedyards, Inc.); Walter P. Pruitt is trustee.

Eureka Cattle Co., Inc.:

Stockholders: Wilbur Gibson; James W. Witherspoon; Paul Engler; John Seiver; A. Warren Owen; Lloyd Olson

Prochemco, Inc.:

Prochemco, Inc., also known as Procor, Inc., is a wholly-owned subsidiary of AZL Resources, Inc. (whose directors and officers are named above under Hereford Feedyards, Inc.); Walter P. Pruitt is trustee.

The following listed persons and/or companies are defendants in some or all of the above-listed cases:

Albertson's, Inc., American Stores Company, f/k/a Acme Markets, Inc., Arden-Mayfair, Inc., Borman's, Inc., First National Stores, Inc., Food Marketing Institute, f/k/a National Association of Food Chains, Food Fair Stores, Inc., Giant Food, Inc., The Grand Union Company, The Great Atlantic & Pacific Tea Company, Inc., Jewel Companies, Inc., The Kroger Co., Lucky Stores, Inc., National Provisioner, Inc., National Tea Company, Safeway Stores, Incorporated, Skaggs Companies, Inc., Skaggs-Albertson's, The Stop & Shop Companies, Inc., Super Valu Stores, Inc., Supermarkets General Corporation, Thriftimart, Inc., Vons Grocery Co., Winn-Dixie Stores, Inc.

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Statutes:

Clayton Act §4, 15 U.S.C. §15 ..... *passim*

IN THE

Supreme Court of the United States

October Term, 1983

No. ———

IN RE BEEF INDUSTRY ANTITRUST LITIGATON
M.D.L. Docket No. 248

MEAT PRICE INVESTIGATORS ASSOCIATION, et al.,

Petitioners,

v.

SAFEWAY STORES, INC., et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINION BELOW

The opinion of the Court of Appeals, which is reproduced in Appendix A, has been reported. *In re Beef Industry Antitrust Litigation*, 710 F.2d 216 (5th Cir. 1983, *rehearing denied* 716 F.2d 901 (5th Cir. 1983). The District Court for the Northern District of Texas entered judgment in the case, which has been reported. *In Re Beef Industry Antitrust Litigation*, 542 F. Supp. 1122 (N.D. Tex. 1982).

JURISDICTION

The judgment of the Court of Appeals, which is reproduced in Appendix A, was entered on July 25, 1983. A timely petition for rehearing was filed on August 8, 1983 and was denied on September 12, 1983. The order denying rehearing is reproduced in Appendix B. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Section 4 of the Clayton Act, 15 U.S.C. § 15, provides:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee."

STATEMENT OF THE CASE

These 19 cases were originally filed beginning in 1975 and subsequently consolidated as M.D.L. No. 248, *In re Beef Industry Antitrust Litigation*. The complaints allege that the defendants, retail chain grocery stores, conspired to fix artificially low the wholesale price for edible beef and to monopolize the beef market in violation of Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1 and 2, seeking injunctive relief and treble damages for injury caused to Plaintiffs/Petitioners' businesses and properties, 15 U.S.C.

§§ 15, 26. The District Court has jurisdiction of the subject matter pursuant to 28 U.S.C. § 1337.

Plaintiffs sell fat cattle to packers, who in turn sell the meat portion (carcass) to the defendants. Plaintiffs allege that the price the defendants pay to packers for the beef carcass predetermines the price the packers pay the plaintiffs for the entire animal. The packer customarily pays the cattleman the retailers' carcass price for the live animal; the packer makes his costs and profit on processing and selling the remaining non-meat portion of the animal, the "offal" which includes the hide, blood and entrails.

Following this Court's decision in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), the District Court dismissed these cases for failure to state a claim upon which relief can be granted. Plaintiffs appealed, and the Court of Appeals reversed and remanded. *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), *cert. denied* 449 U.S. 905 (1980). Based upon the Court of Appeals opinion, remand proceedings concerned solely the "pass-on" issue. September 15, 1981, defendants filed a motion for summary judgment, which the District Court granted on July 14, 1982. On appeal, the Fifth Circuit Court of Appeals, affirmed the District Court.

The evidence considered to be overwhelming by the District Court consists entirely of affidavits of packers who deny that they rigidly, lock-step pass on the carcass price. No packer affidavit asserts that packers absorb any part of the depressed carcass price given by retailers. No packer has sued the defendant retailers for price fixing. There is no possibility of double recovery from these suits.

STATEMENT OF THE FACTS

1. Parties

Plaintiff cattlemen are the primary producers of this country's largest food industry item—beef. Cattle are bred and raised on farms, ranches and commercial feedlots. Plaintiffs produce fat cattle:

> ". . . standardized cattle which have been placed on a high-energy feed for fattening to an optimum weight for sale; the benchmark for fat cattle is U.S.D.A. Choice Grade 3. The term is sufficiently well known and the cattle sufficiently fungible for the Chicago Mercantile Exchange to have a commodities contact for "fat cattle"."

In re Beef Industry Antitrust Litigation (Packer Cases), 607 F.2d 167, 178 (5th Cir. 1979), *cert. denied*, 452 U.S. 905 (1981).

Defendants are the nation's twenty-five largest retail food chains, who purchase beef from packers and slaughterers to supply the retail beef to the consuming public.

Also named as defendants are the retail food chains' national trade association and the publisher of the beef industry's price reporting mechanism, the National Provisioner. The National Provisioner publishes a daily market report, the "Yellow Sheet", which shows the price for carcass beef on any given day. This document is used by packers and retailers as the basis for the price paid by retailers to packers for carcass beef, the packers in turn use this price as the price they pay for live cattle.

2. Wholesale Beef Industry's Operation

Plaintiffs allege that the two largest retail food chains, A&P and Safeway, establish the wholesale price of beef unilaterally, through market dominance, custom and agreement in the industry. A&P and Safeway buy carcass beef on Tuesday and Wednesday of each week and are the only significant purchasers in the market on those days. These prices are reported by the National Provisioner in the Yellow Sheet as the wholesale beef price. Each of the other defendant retail food chains purchase beef at wholesale based upon the Yellow Sheet price established by A&P and Safeway. These retail defendants contract in advance for carcass beef with packers, the contract price being determined by an agreement upon a certain day's issue of the Yellow Sheet. The agreed upon date was usually Tuesday and Wednesday, sometimes Thursday.

Government studies indicate that during the mid-1970's from seventy to ninety percent of the carcass beef sold at wholesale to the retail defendants was sold under this formula pricing mechanism. Sales to A&P and Safeway account for most of the remaining carcass beef sold.

3. Yellow Sheet Cattle Pricing

The Yellow Sheet beef reporter's call sheet shows the beef market is "made" daily by calling eleven major packers. In all major cattle feeding areas east of the Rocky Mountains, the beef prices reported in the Yellow Sheet are used as the basis for the live price offered for fat cattle by all packers.

Cattlemen have noted a direct relationship between the rise and fall of live prices and the rise and fall of the Yellow Sheet price. In fact, IBP, by far the largest beef packer, radios the Yellow Sheet prices to its buyers as the prices are received through telephone conversations with Yellow Sheet reporters.

In December, 1978, the United States Department of Agriculture, Agricultural Marketing Service, Packers and Stockyards Program issued a "Beef Pricing Report". Carlot sales of steer and heifer carcasses were chosen for study because most price information is based upon such sales. USDA employees interviewed persons from 35 packing plants representing 26% of the federally inspected steer and heifer slaughter for all firms in the United States in 1976. These plants account for a majority of carlot beef trading. The report concluded that 70% of all steer and heifer carlot carcass sales of the 35 plants were formula sales based on Yellow Sheet published prices. The report further stated that interviews at the 35 plants indicated that the Yellow Sheet is the principle guide used in determining the bid price in the purchase of live cattle by slaughtering packers.

4. Packing Industry's Operation

Packers purchase fat cattle from cattlemen essentially on two bases:

a. *Live Buying:* where the packer-buyer will offer a per pound live weight date-of-sale price determined at the feedlot after estimating the cattle's yield-grade basis after slaughter; and

b. *Yield-grade on date of kill:* where the packer-buyer will offer a carcass price based on a yield-grade determination after the animal is slaughtered.

In both methods, the packer-buyer is given a ceiling price by his head buyer which he may pay for that portion of the animal which will be carcass beef. The packer-buyer, upon viewing the lot of cattle, determines the live weight by a formula which employs the factors of the estimated carcass percentage weight of the animal, multiplied by the Yellow Sheet price for each of the particular grades.

Russell Walker, IBP's head cattle buyer, testified that he gives buying prices to over 75 cattle buyers working for IBP twice a day. Russell Walker further testified that most of IBP's competitors, including all the major packers, attempt to buy the same grade and yield of beef, and that the base price quoted by IBP to its buyer is for yield grade 3 choice beef. Variations in price for different yield grades and quality grades are based on the quotation for choice yield grade 3. Cattle are generally purchased a pen at a time with the objective of getting 85% choice in the purchase of a pen.

Packer-buyers, including those employed by all of the major packers, have explained the uniformity in price for live cattle by stating that the Yellow Sheet dressed beef price is the ceiling price they can offer. The prices offered by the different packers to cattle producers at the same time are usually the same, and any variance is almost always less than one-half cent per pound. Any variance between live prices on the same pen of cattle offered by different packers can be explained either by an intervening movement of the Yellow Sheet price or by differences in estimating the quality or yield characteristics of the pen by the various different packer-buyers. Plaintiffs' evidence established that the packer buyers are extremely accurate in estimating the grade-yield expectation from live cattle and bids vary by less than one-half of one percent.

The alternative method of purchase, yield-grade on date-of-kill, amounts to an absolute and direct, perfect pass through of the price received by the packer from the retail food chain. In the yield-grade on date-of-kill method, the packer specifies that on the day the cattle are slaughtered and graded, the packer will pay to the cattleman the Yellow Sheet carcass beef price, depending upon the grade and weight of the animal.

While the most prevalent method of buying fat cattle in any of the major fat cattle producing areas of the country is by live weight, between 1973 and early 1978, most packer-buyers, including all the major packer-buyers, have from time to time refused to buy cattle on any other basis than carcass basis, grade-yield per Yellow Sheet on date-of-kill. Most demonstrative of a clear pass-back of the price depression, there have been occasions when the wholesale market declined over a period of time and the packers offered to reserve a place in the kill line on a future date, giving the fat cattle producer the Yellow Sheet price for corresponding quality and yield grade and carcass weight of the slaughtered animal. The price-determining mechanism for each buying basis has been the dressed beef prices quoted in the Yellow Sheet.

5. Live Cattle Industry's Operation

Cattle feeding is confined to 23 states, mostly Iowa, Nebraska, Kansas, Colorado, Texas, Arizona and California. Over 70% of the fat cattle fed in the United States are fed in an area within a 200-mile radius of points on a line between Amarillo, Texas, and Sioux City, Iowa, generally known as the "river points". Main fat cattle concentrations are in the high plains or panhandle area (parts of Texas, New Mexico, Oklahoma, Kansas and Colorado), the Corn Belt area (primarily western Iowa and eastern Nebraska) and the Imperial Valley region of California and Arizona.

Cattle feeding is done primarily in areas where corn or other similar high energy grain can be raised. Cattle are fattened essentially the same way in all cattle feeding areas, by concentrated rations intended to produce cattle graded U.S.D.A. Choice Y-3 or better beef. According to market

studies, over 80% of all fat cattle slaughtered in the United States is U.S.D.A. choice, yield grade 3 or better.

Fat cattle producers usually must sell their product within a 100-mile radius of their feed lot since further transportation leads to adverse market prices and product damage. Fat cattle must be sold in a three week optimum period of readiness or else the cattle will become overfat and much less valuable. Once fat cattle are on high energy rations, they cannot successfully be removed from them. Virtually all fat cattle are purchased by packer-slaughterers from fat cattle producers in three manners: (1) packer-buyers purchase directly from the feedlots; (2) packer-buyers purchase cattle at terminal or auction markets; (3) order-buyers purchase cattle from either the feedlots or the terminal or auction markets for various packers for whom they are agents.

6. Products of the Beef Packing Industry

There are, in essence, two products of the beef packing industry:

a. the edible dressed beef carcass; and
b. the non-edible by-products of the slaughtering process, such as hides, bone meal, blood, intestines, etc., known generally as the "offal".

Because packers uniformly and habitually recover their costs and profits from the offal, the dressed beef portion of the animal is the "by-product" of the packing industry. The packer serves as a funnel between the cattlemen and the retail food chains, through which passes the dressed beef carcass. The packer uses the carcass price established by the retailers as a ceiling price for the price he will pay for the live animal.

There is no price competition for dressed carcasses; the wholesale price is determined by A&P, Safeway and the Yellow Sheet. There is competition in the price the packers receive for selling the various components of the offal or drop. If the market for the various components of offal is good enough, packers will give the cattlemen some more money, on the top of the carcass price, in their effort to bid for the offal. Packers make a profit if they can sell the offal for more than the cost of slaughter (including any premium packers might pay to the cattlemen to get the offal). This also works in reverse. If the offal market is down, then packers will habitually bid something lower than wholesale carcass price, again to make sure they are covering slaughter costs. The offal market is affected by different market factors, in that many offal items are not as perishable as carcass beef, resulting in an ability to store offal items to ride out price declines.

On a temporary basis, packers might adjust the price of live animals to fill up their kill lines. This practice is due to a temporary shortage of the kind of animals needed for slaughter. This variation does not detract from the basic habitual practice of taking the Yellow Sheet wholesale dressed beef price as the top price which will be given for the live animal. Rather, packers temporarily cut into their *offal* revenues if they need animals.

Packers depend upon averages to break even between live animal purchases and carcass beef sales. The habit or custom of packers to use the Yellow Sheet on the date of purchase of the animal, despite the possibility that the wholesale price received from the sale of the dressed carcass will be different some three or more days later when the carcass is finally sold. Packers depend on averages—matching and directly passing

through the price received for the carcasses sold on that day to the price paid for animals purchased on that day. As the Court of Appeals stated in its first opinion, beef carcasses are fungible products. Once cattle are killed and dressed, it is impossible to distinguish between the breed and sex of different carcasses of the same yield grade. Because of the fungibility of beef carcasses, and because packers habitually pay the same price for cattle purchased as they are receiving for carcasses, the wholesale carcass price received will match the basic live price paid over a period of time.

7. "Pass-On" Issue

Plaintiff's summary judgment evidence, and the reasonable inferences that may be drawn from it, demonstrates the following:

Carcass beef, in the context of profits and losses, is a "by-product" of the packing industry, with the profitable "product" being the offal, the portion free from the retail food chains' price-fixing powers. The retail food chains establish the depressed price, paying it to the packers who in turn purchase the carcass beef from the cattlemen, dollar for dollar, with the packers uniformly and habitually making their profits in the separate offal market. Cattlemen are simply selling the carcass beef of the live animal to the retail food chains through conduits called "packers". Likewise, retailers are paying the cattlemen for carcass beef through the same conduit, "packers".

The packers' passing back to the cattlemen monies received from the retail food chains does not have any relationship to packers' profits, or losses, because the custom in the packing industry is to pay only the carcass sale price for the live animal. There is no absorption of the retailers price depres-

sion, for to do so would require, in the mirror-image *Illinois Brick* fact situation, packers to pay an additional increment to the cattlemen to offset the retailers' depression. Evidence of the packing industry's habit and custom in breaking even on the price of the meat comes best from the packers themselves. As stated by Russell Walker, long-time head cattle buyer of IBP, by far the predominant packer in the beef industry:

> The dressed weight price I give my buyers is a price that will enable IBP to break even on the actual cost of the animal—if the dressed market says the same. This means that IBP's kill costs and profits must be made, if at all, on the sale of the by-products—the traditional way in which the packing industry is operated.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS ERRED IN APPLYING THE *ILLINOIS BRICK-HANOVER SHOE* RULE AND ITS EXCEPTION TO SELLERS OF FUNGIBLE COMMODITIES WHO SELL TO PURCHASERS WHO HAVE PRICE-FIXED THE PURCHASING PRICE.

The Court of Appeals over-generalized the holdings of the United States Supreme Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968), and *Illinois Brick Co. v. Illinois*, 431 U.S. 720, *rehearing denied*, 434 U.S. 881 (1977), by broadly applying the holdings of those cases to sellers. *Hanover Shoe* held that a manufacturer could not assert a "pass-on theory of damages" defense against a direct purchaser who paid an overcharge. *Illinois Brick* held that an indirect purchaser could not use a "pass-on theory of damages" offensively to recover overcharges paid.

Petitioner-plaintiffs' complaints allege, however, that petitioner-plaintiffs are damaged, not by the payment of overcharges, but by the inadequate price that they received because the market was artificially depressed through the activities of the respondent-defendants, and other unnamed co-conspirators, in violation of the federal antitrust laws. Neither *Hanover Shoe* nor *Illinois Brick* deals with—or even refers to first sellers of fungible commodities into a conspiratorially rigged market for an artificially depressed price. *See Florida Power Corp. v. Granlund*, 78 F.R.D. 441 (M.D. Fla. 1978).

These causes of action pose no apportionment problem because no *overcharge* has been *paid*. The allegations of the Amended and Substituted Complaint assert an artificially depressed market price for fat cattle. In contrast, the problem addressed by this Court in *Hanover Shoe-Illinois Brick* is what might be termed a "trickle down" problem—a problem of tracing the overcharge to and overpayment by a direct purchaser through successive levels of overcharge and overpayment where, at any of the several levels, all or part of the damages suffered by reason of the *payment* of the overcharge might be absorbed by the payor. In this action, however, there is no "trickle down". The cattlemen, who are selling their perishable product at a conspiratorially depressed price into an artificially depressed market which, in short term is inelastic, can neither recoup or pass-on any loss they suffer nor make up that loss by passing on an overcharge because they are the *first sellers* into the rigged market. Therefore, any apportionment of damages will be only among the *first sellers into* the conspiratorially depressed market—not, as in *Illinois Brick*, among successive levels of the market itself. The Court of Appeals accurately recognized:

> The plaintiffs' theory of damages is not in all respects a pass-on type of theory. Their theory, stated most broadly is that the activities of the alleged price-fixing conspiracy depressed wholesale prices generally, and not simply the prices paid by members of the conspiracy, and that packers and slaughterers based their purchases of live cattle on the depressed wholesale price. It is immaterial whether or not a steer purchased from a plaintiff found its way into the hands of a conspirator retailer. It is enough if, as alleged, the conspirators' activities caused a general depression in wholesale prices and the intermediary purchasing from a plaintiff based his pricing decision on the depressed wholesale beef price.

In re Beef Industry Antitrust Litigation, 600 F.2d 1148, 1166 n.24 (5th Cir. 1979).

This Court has recognized the seriousness of monopsony or oligopsony power at the dominant position of the market place. If a violation of the antitrust laws occurs in this critical position, the entire market place is directly affected and injured. As this Court noted in *United States v. Patten*, 226 U.S. 525 (1912), with regard to allegations concerning the defendant's alleged "cornering" of the cotton market:

> It well may be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to *thwart the usual operation of the laws of supply and demand*, withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition. *Id.* at 542. (Emphasis added.)

In another monopsony case, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), this Court again recognized that a conspiracy, which exists in that position of the market where a commodity is purchased and put into the stream of commerce is the critical position of the entire market. "And those who [are] in that strategic position would have it in their power to destroy or drastically impair the competitive system." *Id.* at 22.

Therefore, a violation of the antitrust laws by those persons who stand in this key position in the market creates not just an individualized injury, which occurs when there is an overcharge passed through a chain of distribution to an ultimate consumer as in *Illinois Brick*, but creates an injury which permeates the entire market, "directly interfering with the free play of market forces." *Socony-Vacuum*, 310 U.S. at 221. In the present cause, plaintiffs have alleged that defendants have conspired to restrain trade in the entire market for the production, slaughter and purchase of fat cattle. Defendants have chosen as their tool for the manipulation of this market, the price they have agreed to pay for fresh processed carcass beef produced from fat cattle. Defendants, who occupy a key position in the market, were therefore able to manipulate and to conspiratorially rig the entire market which is inelastic in the short-term and into which plaintiffs were forced to sell their live fat cattle.

While recognizing that plaintiffs claim damage to the market in general and that "[plaintiffs] sold their livestock for less than they would have in the open and competitive market," the Fifth Circuit Court of Appeals held that *Illinois Brick* was of such general application that it applied to circumstances where the market was allegedly manipulated by use of price and where the defendants monopolized and at-

tempted to monopolize said market by use of illegal pricing practices. The purpose of the federal antitrust laws is to regulate and protect competition. *Mandeville Is. Farms v. American C. S. Co.*, 334 U.S. 219, 243 *rehearing denied* 334 U.S. 835 (1947); *Fontana Aviation, Inc. v. Cessna Aircraft Co.*, 617 F.2d 478, 482 (7th Cir. 1980). Surely this Court did not intend *Illinois Brick* to thwart the Congressional scheme of regulation and protection by barring recovery of damages by those persons injured in their business or property where the free market forces are conspiratorially and illegally controlled through the use of illegally depressed pricing.

The beef marketplace in 1890 was essentially no different than it exists today. When the Sherman Act was passed, Congress clearly sought to protect the farmer from the very evils complained of in this case. Subsequently, Congress passed Clayton 4, giving a private remedy to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws." 15 U.S.C. § 15.

Today, the cattleman sells live cattle into the funnel end of a distribution chain, claiming that a remote purchaser, who controls the buying power, has depressed the wholesale price for what that purchaser buys, directly injuring the cattle producer. The intermediary, the packer, is unconcerned about the price he received for the meat, since he merely passes that price back to the cattleman as his cost in the live animal. (In fact, the cheaper the price for the meat, the less the packer has to pay to acquire the offal.) In this context the concerns espoused in *Illinois Brick-Hanover Shoe* do not prevail. Plaintiffs' claims here do not rest "at bottom on some abstract conception or speculative measure of harm." *Blue Shield v. McCready*, 457 U.S. 465, 102 S. Ct. 2540, 2546-47, n.11 (1982). In this recent case, this Court re-focused its

attention on the *Illinois Brick-Hanover Shoe* rule, providing additional guidance in applying those concerns to the present action:

> It is reasonable to assume that Congress did not intend to allow every person tangentially affected by an antitrust violation to maintain an action to recover threefold damages for the injury to his business or property . . . [however] the unrestrictive language of the section, and the avowed breadth of the congressional purpose, cautions us not cabin § 4 in ways that will defeat its broad remedial objective. But the potency of the remedy implies the need for some care in its application. In the absence of direct guidance from Congress, and faced with the claim that a particular injury is too remote from the alleged violation to warrant § 4 standing, the courts are thus forced to resort to an analysis no less elusive than that employed traditionally by courts at common law with respect to the matter of "proximate cause". See *Perkins v. Standard Oil Co.*, 395 U.S. 642, 649, 89 S.Ct. 1871, 1875, 23 L.Ed.2d 599 (1969); *Karseal Corporation v. Richfield Oil Corporation*, 221 F.2d 358, 363 (CA9 1955). In applying that elusive concept to this statutory action, we look (1) to the physical and economic nexus between the alleged violation and the harm to the plaintiff, and (2) more particularly, to the relationship of the injury alleged with those forms of injury about which Congress was likely to have been concerned in making defendant's conduct unlawful and in providing a private remedy under § 4.

102 S.Ct. at 2547-48.

In the present case "the physical and economic nexus between the alleged violation and the harm to the plaintiff[s]"

is direct; it is, in fact, predictable. Likewise, Congress was directly concerned with the tangible economic injury suffered here by plaintiffs when the Sherman Act was originally passed.

The Court in *Blue Shield v. McCready* was concerned at a practical level with ensuring that someone be available to bring an action which would "further certain basic objectives of the private enforcement scheme embodied in § 4." 102 S.Ct. at 2546, n.10. In the present case members of the packing industry have failed to sue the retailers for violations occurring during the relevant period claimed in plaintiffs' complaints. Those claims are time barred. Cattlemen are the *only* private parties available to bring this action and should be allowed to sue to recover the full amount of the illegal price depression in wholesale meat.

II. THE COURT OF APPEALS ERRED IN AFFIRMING THE DISTRICT COURT'S GRANTING OF A MOTION FOR SUMMARY JUDGMENT ON THE "PASS-ON" ISSUE BECAUSE PLAINTIFF-PETITIONERS PROFFERRED EVIDENCE CREATING A MATERIAL FACT DISPUTE REQUIRING A JURY TRIAL.

Even if this Court determines that *Illinois Brick* applies to this case, petitioners submit they provided evidence before the District Court that Petitioners fall within the equivalent of the recognized exception to *Illinois Brick*.

A. The Exception To: *Illinois Brick-Hanover Shoe.*

The court of appeals held that although these cases are controlled by the Supreme Court's decision in *Illinois Brick*, plaintiffs had pleaded themselves within an exception to the *Illinois Brick* rule. *In re Beef Industry Antitrust Litigation*,

600 F.2d 1148 (5th Cir. 1979), *cert. denied*, 449 U.S. 905 (1980). The exception allowed was traced through *Illinois Brick* to this Court's decision in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

It is clear from the *Hanover Shoe* and *Illinois Brick* opinions that the exception to the use of pass-on is not solely proof of the existence of a cost-plus contract between parties in the chain of distribution. That example works only in the context of suits brought by plaintiffs upstream in the chain of distribution. Where plaintiffs are suing a remote defendant-purchaser situated downstream in the chain of distribution, alleging that they are selling their product into a rigged marketplace and, thus, receiving an artificially low price for their product, restricting the exception to the cost-plus pass-on situation would make pass-on offensively or defensively impossible to show. The use of a cost-plus contract between packers and retailers in the context of the present case would render logically impossible price-fixing claims by cattlemen against retailers. Obviously the exception to the *Hanover Shoe-Illinois Brick* rule must encompass situations other than "pre-existing cost-plus contracts". That is essentially a portion of the holding by the Court of Appeals in the first appeal:

> As we understand these cases [*Hanover Shoe* and *Illinois Brick*], the Court meant the scope of the exception to be narrow, but it did not imply that only cases involving cost-plus contracts qualify. Commentators have observed that *Hanover Shoe* and *Illinois Brick* permit the assertion of passing-on in situations that are functional equivalent of the cost-plus contract case.

600 F.2d at 1163. Although the District Court paid lip service to this admonition, a reading of the District Court's opinion

demonstrates that plaintiffs were actually held to a stricter standard: detailed proof that *every* transaction accomplished the same result as a cost-plus contract, i.e., "push-pull-click-click". 542 F. Supp. 1134.

B. The Court of Appeals erred in affirming the District Court, who failed to pose the correct factual issue to be determined by defendants' motion for summary judgment.

In deciding a motion for summary judgment a trial court must of necessity determine the factual questions for decision; and if evidence regarding the answer to the question is in dispute, the question must be put to the jury. The Trial Court undertook this exercise, but asked the wrong question. 542 F. Supp. at 1130-31.

The Trial Court stated the issue thus:

> It follows that the retailers must prove that no genuine issue of material fact exists with regard to the feeders' inability to present cost-plus equivalency proof in a non-complex manner.

542 F. Supp. at 1311. That question could hardly be posed to a jury as framed, and would not address the basic issue even if it could be answered. The correct fact question is: "During the relevant period, did the packing industry absorb any portion of the artificially depressed price for wholesale beef?"

If the plaintiffs produce evidence that the packers did not absorb any portion of the price depression (regardless of the mechanism), they must surely prevail on the motion for summary judgment, unless that evidence is of the speculative nature condemned by this Court. For the following reasons

we believe plaintiffs met their summary judgment burden of producing evidence which, at the least, created issues of material fact.

There is essential fallacy in the district court's insistence on evidence of a "rigid, lock-step" relationship between cattle price and the Yellow Sheet as being necessary to comply with the *Illinois Brick-Hanover Shoe* standards.

The middleman packer must make a margin over his costs somewhere in his operations in order to survive economically. The packer has two ways of doing this: either sell some portion of his product above cost, or reduce costs. Plaintiff's evidence shows, uncontraverted, that the head cattle buyer for the largest packer in the country has stated in 1977 that the traditional way the packing industry operated is to attempt to break even on the carcass, i.e., the carcass is sold at the cost of procuring the animal. The packer has costs of obtaining, slaughtering and processing the animal that must be met in order to stay in business. These costs are met by either selling the offal at a profit or obtaining the animal at a lower cost. Thus one would expect to see the live cattle price to be either at or lower than the Yellow Sheet, even if the packers pursued the second strategy.

All *Hanover Shoe* and *Illinois Brick* require is evidence that the middleman uses some device to protect against absorption of loss from the price-fixed item. Plaintiffs' evidence shows that the packer used the Yellow Sheet for such protection. By analogy to the cost plus situation, the carcass is the "cost" and the offal is the "plus." There is nothing in the case law that requires the "plus" to be "rigid" or "lock-step." Indeed, a middleman could have a variable "plus" and certainly the "plus" might not cover all of his other costs. The essence of "cost-plus" for *Illinois Brick* purposes is in the unvarying

passing of the "cost" part, not in the rigidity or lack thereof of the "plus" part.

The packer does not move cattle through his plant for the carcass, but for the offal. All of defendants' evidence shows that the packer might vary his pricing decisions with respect to cattle depending on supply and demand conditions for offal. This is the traditional and habitual way the packing industry works. This is no more inconsistent with "perfect pass-through" of the price fix than a cost plus contract with a variable "plus" would be. This proof complies with *Illinois Brick* and *Hanover Shoe.*

C. The Retailers' evidence failed to make a prima facie case that the Packers absorbed some portion of the alleged undercharge.

The Court of Appeals affirmed the District Court, finding that the defendants presented evidence that:

> a variety of factors influenced the pricing decisions made by packers . . . it is beyond reasonable factual dispute that the feeders cannot show that the pricing decisions of the packers are . . . "determined in advance without regard to the interactions of supply and demand, 600 F.2d at 1165, or that the . . . habitual use of predetermined formula would enable measurement of the effect on prices for fat cattle or changes in wholesale price." *Id.*

542 F. Supp. at 1311. Accordingly, the District Court held for the defendants, even though they presented no evidence as to whether or not the packers, over any given period of time, actually absorbed any of the illegal depression in the wholesale meat price.

The evidence submitted by defendants indicated that the packers' pricing decisions sometimes wandered from strict adherence to the "Yellow Sheet" price because of five influencing factors: (1) Packer's individual needs, (2) Competition and negotiations for cattle, (3) Estimating cattle characteristics, (4) Conditions of the cattle market, and (5) the By-Product market. 542 F. Supp. at 1311-34.

Without regard to plaintiffs' evidence that these factors resulted in *de minimis* changes in the packers' bid price, the District Court concluded that because a *perfect* pass-on of the wholesale price might not occur, plaintiffs could not prevail. Petitioners submit, however, that defendants have the burden of showing, *prima facie* at least, that the packers absorbed some portion of the depression in the wholesale meat price when they purchased cattle, *over time*. For indeed, if there is no absorption, there is no injury to the packers and therefore no basis for claiming a duplicative recovery. There is no evidence of absorption by packers in the record.

To the contrary, plaintiffs presented evidence that the packing industry traditionally ("habitually") breaks even on the meat, covering costs and profits from the "offal" market. The price influencing factors seized upon by the District Court, thus, relate not to the meat, but to the drop, the "plus" in this "functional equivalent" to a "cost-plus" contract.

D. The Court of Appeals, in affirming the District Court, erroneously ignored evidence submitted by plaintiffs which created, at the least, material factual disputes.

Plaintiffs' summary judgment evidence showed that the packing industry, through the consistent and habitual use of a formula applied to the "Yellow Sheet" wholesale beef price, passed on to cattlemen (plaintiffs) that price for the live animal; that the packing industry has traditionally attempted to pay cattlemen an amount for the live animal equal to the amount the packer receives for the red meat; and that the packing industry has traditionally been successful in achieving this result. This evidence included testimony, depositions and affidavits of cattle purchasers, packer buyers, packer owners, economists and others. Not only did the District Court ignore much of this evidence, but the District Court improperly *weighed* the evidence. All inferences made by the court were in defendants' favor, as best exemplified by the speculative excursion taken in pages 29-30 of the Memorandum Opinion. Although the District Court acknowledged the proper summary judgment standards and burden of proof 542 F. Supp. at 1129-1131, it departed from those requirements in analyzing the evidence in this case.

In reaching the conclusion that a packer's individual needs affected pricing decisions, the District Court accepted at face value a portion of Russell Walker's testimony 542 F. Supp. at 1311, but entirely ignored his original affidavit that stated: "The dressed weight prices I give my buyers is a price that will enable I.B.P. to break even on the actual cost of the animal . . . ." In this regard the District Court, likewise, ignored the evidence from Mr. Whorton, the head cattle buyer for Spencer Foods, which established that the packers passed on the money they received for the carcass to the cattlemen

as the total price for the live animal and worked with the offal on the losses and gains. The District Court refused to consider packer and other evidence showing the habitual method of purchasing and the goal sought to be achieved.

In concluding that competition between packers affects their pricing decisions, the District Court accepted at face value the defendants' affidavits from Swift and Sunflower, 542 F. Supp. at 1132, but dismissed plaintiffs' evidence that any variance between packer offering prices on the same pen of cattle can be explained by an intervening movement in the wholesale price or by differences in estimating the quality of the pen of cattle. The court simply disregarded that these differences were *de minimis* in any case. This amounted to the District Court giving all favorable inferences to the moving party which is directly contradictory to this Court's holding in *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).

The retailers' argument (and the District Court's ruling) assumes that there is a price fix at the wholesale/retail level. The illogic of the District Court's ruling can be demonstrated by asking the question: How can a wholesaler survive under such circumstances, where he is bidding into a free market for his essential supply and then selling his product into a rigged price floor? The cost of obtaining the essential supply (live cattle) is a huge cost to the packer. If the slaughterer purchases 50,000 head of cattle weighing 1100 pounds each at an average of 90¢ per pound dressed, his outlay is $29,700,000. If he can receive only 89¢ from the retailer, he has lost $330,000.

In a short time, under such circumstances, the packer would be forced out of business. During the relevant time, however, packers remained in business. How were they able to do this? Two possibilities exist. Either the wholesale price of beef

moved in response to the live price, or the live price moved in response to the wholesale price, in order to assure that the packer would at least break even.

There is no evidence in the record that the packer established price to the retailer in reference to the live price. Such evidence would have to show a cost based pricing with reference to the live price. In fact, all evidence shows the wholesale price to be determined by reference to the wholesale price guide—the Yellow Sheet. The pricing of wholesale carcasses is shown by interrogatory to be established in advance by a certain day's Yellow Sheet price. An IBP study shows the price of all boxed beef was also established in advance by reference to "Yellow Sheet—Top Half."

Inasmuch as selling price is known in advance to be the wholesale market as quoted in the Yellow Sheet, tolerance by packers of a free market for the essential supply—live cattle—would result in quick bankruptcy.

Thus we have Russell Walker of IBP saying that the price he gives his cattle buyers for live cattle is the price that will enable IBP to break even on the beef, the traditional way the packing industry works. He relies on the Yellow Sheet, because the Yellow Sheet determines the price at which IBP can sell the beef to the retailers. That is the *only* way the packer can avoid a huge loss in the gigantic dollar cost of obtaining cattle.

The evidence shows that the business of the packer is the processing and sale of the "by-product", "offal", or "drop". This is a separate and distinct product which has a separate market. The retailers do not buy the by-product. The packers #1 business revolves around obtaining and processing the offal for less money than is received from its sale. Accord-

ingly, there is some price fluctuation in live price because of competition for the offal.

A packer's kill costs and other overhead are covered by sale from the offal. Hence, the packer might be willing to bid more than the wholesale price to the cattlefeeder in order to get the offal.

There is no evidence that the packer ever bids more for the animals in order to obtain carcasses meat that he will sell to the retailer at a loss. Common sense and the dollars involved in such a possible strategy indicate its essential foolishness and lack of basis in fact.

The only justification for finding a free live cattle market would be a finding that the wholesale market was not rigged. This finding is not even attempted in the District Court's ruling.

Pass-on is simple to prove in this case. There is no evidence in the record that any packer went out of business because he could not obtain live cattle for less than he could sell the beef at wholesale. The reason for this lack of evidence is the industry wide "tradition" of packers to use the Yellow Sheet price to determine live cattle price.

CONCLUSION

For each of the foregoing reasons the petitioners respectfully petition that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit to review the substantial questions presented.

Respectfully submitted,

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APPENDIX

APPENDIX A

In re BEEF INDUSTRY ANTITRUST LITIGATION—
MDL DOCKET NO. 248.

A. L. BLACK, et al.,
Plaintiffs-Appellants,

v.

ALBERTSON'S, INC., et al.,
Defendants-Appellees.

R. DIRK AGEE, a/k/a Shoshone Indian Tribe of Duckwater, et al.,
Plaintiffs-Appellants,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

MEAT PRICE INVESTIGATORS ASSOCIATION, etc., et al.,
Plaintiffs-Appellants,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

RONALD BECKER, et al.,
Plaintiffs-Appellants,

v.

SAFEWAY STORES, INC., et al.,
Defendants-Appellees.

PONY CREEK CATTLE COMPANY, INC., et al.,
Plaintiffs-Appellants,

v.

The GREAT ATLANTIC & PACIFIC TEA COMPANY, et al.,

Defendants-Appellees.

RICHARD S. LOWE, et al.,

Plaintiffs-Appellants,

v.

SAFEWAY STORES, INC., et al.,

Defendants-Appellees.

Nos. 82-1433 to 82-1437.
United States Court of Appeals,
Fifth Circuit.
July 25, 1983.

Appeals from the United States District Court for the Northern District of Texas.

Before REAVLEY and JOHNSON, Circuit Judges, and WYZANSKI*, District Judge.

REAVLEY, Circuit Judge:

This case reaches us for the second time. On the prior appeal, *In re Beef Industry Antitrust Litigation*, 600 F.2d 1148 (5th Cir. 1979), (*Beef I*) this court reversed the district court's dismissal on the pleadings of the plaintiffs' claim. Returning to the district court, the defendants once again prevailed, this time on a motion for summary judgment. *In re Beef Industry Antitrust Litigation*, 542 F.Supp. 1122 (N.D.Tex. 1982) (*Beef II*). Plaintiff-appellants return, but we agree with the district court's opinion and affirm.

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* District Judge of the District of Massachusetts, sitting by designation.

FACTS

Plaintiffs are feeders who fatten cattle and prepare them for market. Defendants are, with certain exceptions, retail grocery chains who sell beef to the public.[1] Plaintiffs alleged that defendants engaged in a conspiracy to set wholesale beef prices at artificially depressed levels. Plaintiffs, however, do not sell their cattle directly to the defendants. Instead, the plaintiffs sell to middlemen, the packers, who slaughter the cattle and sell the beef to defendants. Plaintiffs alleged that the packers passed on these artificially depressed prices without absorbing any losses.

This allegation ran into the seemingly insurmountable obstacle of the Supreme Court's pronouncements in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481, 88 S.Ct. 2224, 20 L.Ed.2d 1231 (1968) and *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977). In *Hanover Shoe*, the court held that a defendant may not assert that the plaintiff was not damaged by the defendant's monopoly price when the plaintiff passed on that price to its customers. The court rejected this "pass-on" defense because of the difficulty in reconstructing a company's pricing and output decisions, and because of concerns with overburdening already complicated antitrust actions. In *Illinois Brick*, the court rejected the offensive use by plaintiffs of this pass-on theory. The court relied on a rationale similar to *Hanover Shoe*, but stressed more heavily the potential impairment of the treble damage remedy by the introduction of complicated tracing evidence regarding pricing decisions.

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[1] The exceptions are one wholesale grocer, a national trade association and the publisher of a beef industry price list, the Yellow Sheet.

Faced with this obstacle, the plaintiffs asserted that their suit fell within an exception for cost-plus contracts mentioned in both *Hanover Shoe* and *Illinois Brick*. The court in *Illinois Brick* explained the exception's rationale:

> The [*Hanover Shoe*] Court allowed a pass-on defense . . . because the pre-existing cost-plus contract makes easy the normally complicated task of demonstrating that the overcharge has not been absorbed by the direct purchaser.

431 U.S. at 732 n. 12, 97 S.Ct. at 2067 n. 12.

Plaintiffs argued that certain peculiarities and practices of the beef industry created the functional equivalent of a cost-plus contract. They alleged that the defendants set beef prices that were reported daily in the National Provisioner Daily Market and News Service or "Yellow Sheet," and that the packers then engaged in rigid formula pricing based on the Yellow Sheet. Plaintiffs also alleged that due to the relatively short period of time in which a fattened steer or heifer will achieve and remain at choice grade, the supply of cattle is inelastic, and the plaintiffs are therefore unable to negotiate price or withhold their product.

This court in *Beef I* agreed with plaintiffs in the procedural posture of a dismissal on the pleadings. The court stated:

> [T]he allegations of the complaints state a case within the "cost-plus" exception. The complaints sufficiently allege that the impact of the retail chains' price changes upon the pricing decisions of the packers is determined in advance without regard to the interactions of supply and demand. The plaintiffs allege that the packers set the price of live cattle by strictly applying certain formulae to the Yellow Sheet or Safeway wholesale beef price. Under these allegations a plaintiff would be entitled, once he proved what the competitive wholesale price would

> have been for a given grade of beef in a given region at a given time, and once he established that the packer to whom he sold strictly applied a formula to the Yellow Sheet price for the particular sale, to damages in the amount of the difference between the price he actually received on that sale of fat cattle and the price he would have received absent price-fixing (computed by applying the packer's formula to the constructed competitive wholesale price). The packer's habitual use of predetermined formulae would enable measurement of the effect on prices for fat cattle of changes in wholesale prices. The plaintiffs have alleged the functional equivalent of cost-plus contracts.

(footnotes omitted) 600 F.2d at 1165. The court, however, also emphasized that the plaintiffs would be required to present "detailed proof as to individual transactions," *Id.* at 1166.

Plaintiffs' summary judgment proof, however, falls far short of their allegations. The defendant-retailers showed that there was no genuine issue as to any material fact and that they were entitled to judgment as a matter of law. Fed. R.Civ.P. 56(c); *Mississippi Hospital Association, Inc. v. Heckler*, 701 F.2d 511, 516 (5th Cir. 1983). The defendants' overwhelming proof demonstrates that other factors beyond the Yellow Sheet quotations influenced the packers' pricing decision. Specifically, the proof showed that the following factors influenced packers' pricing decisions:

> (1) The packers' individual needs in regard to obtaining a minimum amount of cattle each week. This was necessitated by labor contracts which required that if the packers opened their doors on Monday, they had to pay their employees for the week, regardless of whether they worked.

(2) Temporary local market conditions such as the weather or an over or undersupply of beef. This forced the packers to bid over or under the Yellow Sheet price.

(3) Price competition among the packers.

(4) The beef by-product market (i.e. the sale of hides and nonedible parts of cattle). This market was highly competitive and forced the packers to pay prices over and under the Yellow Sheet price.

Plaintiffs do not seriously contest that these factors did, on occasion, affect the packers' pricing decision. Instead, they assert that at a trial on the merits, the district court should examine evidence of the effect of these factors over time, as opposed to a transaction by transaction basis. Plaintiffs presented affidavit testimony that the packers *attempted* to break even on the beef and recover slaughtering costs and profits from the sale of the beef by-products.

While at first blush this argument may seem appealing, it does not withstand close examination. In *Beef I*, we stressed that plaintiffs alleged that defendants "*strictly* appli[ed] certain formulae to the Yellow Sheet . . . price." 600 F.2d at 1165, and we characterized the packers alleged pricing practices as "rigid formula pricing." *Id.* at 1166. This emphasis on the rigidity and strictness of this formula pricing was not inadvertent. It was mandated by the nature of the cost-plus contract and the Supreme Court's rejection of an exception for cost based rules of thumb in *Illinois Brick*. The nature of a cost-plus contract is such that there is absolute certainty as to the application and the amount of the pass-on. Individual transactions do not have to be weighed to measure whether and to what extent the pass-on occurred. Plaintiffs' averaging theory does not partake of this certainty. As the district court

noted, "[i]f packers averaged out gains and losses, . . . they would absorb some loss on some days." *Beef II*, 542 F.Supp. at 1139 n. 19. To show how much of the loss was absorbed by the packers would be to resort to the sort of speculative evidence forbidden by *Illinois Brick*.

Plaintiffs' averaging theory also runs afoul of *Illinois Brick's* rejection of an exception for "cost-based rules of thumb in setting prices." 431 U.S. at 744, 97 S.Ct. at 2073. To say that *on the average*, packers attempted to pay the Yellow Sheet price for beef is to say that the Yellow Sheet was no more than a rule of thumb. As the Court explained in *Illinois Brick*:

> These rules are not adhered to rigidly, however; the extent of the markup (or the allocation of costs) is varied to reflect demand conditions. The intricacies of tracing the effect of an overcharge on the purchaser's prices, costs, sales, and profits thus are not spared the litigants. (citations omitted). *Id.*

Plaintiffs also invite us to reverse *Beef I* and hold that *Illinois Brick* does not apply. We decline this invitation, because we are bound and, as well, because we agree with it.

AFFIRMED.

APPENDIX B

UNITED STATES COURT OF APPEALS
Fifth Circuit

DENIALS OF REHEARING EN BANC

(Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 35)

Group 1—Denials where no member of the panel nor Judge in regular active service on the Court requested that the Court be polled on rehearing en banc.

Group 2—Denials after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Group 3—Denials on the Court's own motion after a poll requested by a member of the panel or a Circuit Judge in regular active service.

Title	Docket Number	Date of Denial	Citation of Panel Decision
GROUP 1			
Becker v. Safeway Stores, Inc.	82-1433, 82-1437	9/12/83	N.D.Tex., 710 F.2d 216
Beef Industry Antitrust Litigation, In re	82-1433, 82-1437	9/12/83	N.D.Tex., 710 F.2d 216
* * *			
Meat Price Investigations Ass'n v. Safeway Stores, Inc.	82-1433, 82-1437	9/12/83	N.D.Tex., 710 F.2d 216

(Published at 716 F.2d 901 (5th Cir. 1983))